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In the Supreme Court of the United States

LEVON DEAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE*

Amici curiae are the National Association of Criminal Defense Lawyers (NACDL) and Families Against Mandatory Minimums (FAMM).

* Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Petitioner's consent to the filing of amicus briefs is filed with the Clerk. Amici received respondent's consent to file this brief by letter and have filed that letter with the Clerk.

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a membership of many thousands of direct members and up to 40,000 affiliated members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide assistance to courts in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

FAMM is a national, nonprofit, nonpartisan organization of approximately 68,000 members. FAMM was founded in 1991 to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing and sharing the stories of prisoners and their families who have been adversely affected by unjust sentences, FAMM illustrates the human face of sentencing as it advocates for federal and state sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected amicus filings, including many in this Court.

Amici believe that the punishment imposed must always fit the crime—and the offender. Thus, amici promote sentencing policies that give judges principled discretion to consider the fullest information possible about the defendants before them. Amici aspire to a nation in which sentencing is individualized and humane—and sufficient but not greater than necessary to impose

just punishment, secure public safety, and support the successful rehabilitation efforts of offenders.

The case of petitioner Lævon Dean, Jr. illustrates the reasons why judges must have wide discretion to consider all information about the defendants before them. Mr. Dean was convicted of conspiracy to commit robbery and robbery, in violation of 18 U.S.C. §§ 2 and 1951, and two counts of possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c), on the basis of aiding and abetting liability. Pet. App. 5, 11. The robberies were led by Mr. Dean's brother, who brought the firearms to the crime scenes and used them as clubs to strike the victims. Pet. App. 3. Mr. Dean, who had no violent criminal history, J.A. 26, was, in the words of the prosecutor, "not as culpable" and "a follower," J.A. 22–23. Nevertheless, because he was convicted of two § 924(c) counts, Mr. Dean received mandatory minimum consecutive sentences of 5 and 25 years, and thus will spend at least the next 30 years of his life in prison.[1] The district judge believed that sentencing Mr. Dean to 30 years and one day reflecting all counts was "*more than sufficient* for a sentence in this case." J.A. 26 (emphasis added). Consistent with the Eighth Circuit's decision in *United States* v. *Hatcher*, 501 F.3d 931 (8th Cir. 2007), *cert. denied*, 552 U.S. 1170 (2008), however, the district judge concluded that he was required to determine the robbery sentences in a vacuum and then tack the 30-year mandatory minimums on top. He therefore sentenced Mr. Dean to a total

[1] The two mandatory minimum sentences are not in dispute in this case.

of 400 months' imprisonment—40 months longer than the 30-year sentence he deemed more than adequate.

Petitioner's case is not unique. Thousands of individuals, including amicus FAMM's members and defendants represented by amicus NACDL's members, receive mandatory minimum sentences under § 924(c) each year.[2] As the result of decisions such as *Hatcher*, district judges are often forced to impose sentences on the underlying offenses they deem "unjust and unreasonable." *United States* v. *Roberson*, 573 F. Supp. 2d 1040, 1047 (N.D. Ill. 2008).

Consider, for example, the case of Gary Roberson. Mr. Roberson was convicted of bank robbery and brandishing a firearm in furtherance of a crime of violence, which carried an 84-month mandatory minimum sentence. *Id.* at 1041. The district judge determined that "a reasonable sentence for all of the charged conduct" was 85 months—which was the midpoint of the Guidelines range for bank robbery with an enhancement for brandishing a firearm. *Id.* at 1045. To effectuate that sentence, she imposed a one-month sentence on the underlying offense, and added an 84-month mandatory minimum sentence, to be served consecutively. *Ibid.* The U.S. Court of Appeals for the Seventh Circuit, however, reversed, following the same rationale as *Hatcher*. *See* 474 F.3d 432 (7th Cir. 2007). On remand, the district judge reiterated that "the sentence for this case as a whole, which best[] serves the § 3553(a) purposes, is the originally-imposed 85 months." 573 F. Supp. 2d at 1051. Following the Seventh Circuit's instructions, however,

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[2] *See, e.g.*, United States Sentencing Commission, *Quick Facts: Section 924(c) Firearms Offenses (2008–2012)* <http://tinyurl.com/924cFacts>.

she ignored the mandatory minimum, rendered a 36-month sentence on the underlying offense, and then added to it the 84-month mandatory minimum, with both sentences to run consecutively.

Amici appear in support of petitioner because the Eighth Circuit profoundly erred by prohibiting a sentencing judge's consideration of a mandatory non-concurrent sentence under § 924(c) when fashioning a sentence that is sufficient but not greater than necessary for the underlying offense. That "blinkered view," which the Tenth Circuit properly rejected in *United States* v. *Smith*, 756 F.3d 1179, 1180 (10th Cir. 2014), conflicts with centuries of traditional sentencing practices in the United States and a clear statutory command entrusting judges with significant discretion to consider the fullest information possible about the offenders before them. If this Court upholds the Eighth Circuit's misguided interpretation, district judges—like the one in this case—will be forced to continue imposing needlessly harsh sentences.

Amici submit this brief to underscore the enduring American tradition of informed and principled judicial discretion in criminal sentencing. In amici's view, a proper understanding of the different facets of judicial discretion, coupled with a close reading of the statutory language, is necessary to comprehend what § 924(c) requires—and what it does not. In addition, assuming *arguendo* a reasonable doubt as to the meaning of § 924(c), amici believe this case presents the Court with an opportunity to affirm the continuing vitality of the rule of lenity, particularly as applied to mandatory minimum sentencing provisions.

SUMMARY OF ARGUMENT

The history of federal criminal sentencing in the United States has included sometimes controversial shifts in the discretion granted to judges. But despite these ebbs and flows in the tides of judicial discretion, there has been one constant: Judges have always been entrusted with the power and duty to base their sentencing decisions on the fullest information possible concerning the cases and offenders before them. In light of the central role that judicial discretion has historically occupied in the sentencing context, this Court has repeatedly stated that it will not infer congressional intent to abrogate judicial discretion absent a clear statement to that effect. Congress itself has embraced that principle in the Sentencing Reform Act of 1984. Section 924(c) of Title 18, however, does not contain any such statement. Rather, § 924(c) means only what it says: A judge must sentence an offender to at least the mandatory minimum on that count, which may not run concurrently with any other term of the sentence. It does not require the judge to blind herself to the § 924(c) sentence when she imposes *other* sentences on the same offender.

I. Post-Revolutionary reformers reacted to the harshness of the British common law by embracing judicial discretion as a means of ensuring individualized punishment. Judges have long had discretion in deciding the term of a sentence, in structuring a sentence on multiple counts, and in considering all relevant information in arriving at the sentence. Modern reforms have limited some aspects of judicial discretion in sentencing in some cases, but Congress has not curtailed a judge's discretion to consider the fullest information possible concerning the defendant. On the contrary, Congress has repeatedly affirmed a judge's discretion to consider a wide spectrum of

information about the case and the offender, reflecting the settled principle that punishment must fit both the crime and the offender.

II. Because sentencing is a matter that has traditionally been committed to judicial discretion, sentencing statutes are interpreted in light of the common-law background against which they were enacted. This Court has long required that Congress provide a clear statement of intent to abrogate judicial discretion in sentencing. Because Congress knows how to direct sentencing practices in express terms, this Court is reluctant to infer meaning from legislative silence or ambiguity. Congress expressly incorporated this principle in the Sentencing Reform Act, when it instructed district judges to sentence defendants in accordance with the Act in all cases and in all respects "[e]xcept as otherwise *specifically* provided." 18 U.S.C. § 3551(a) (emphasis added).

III. Measured against this Court's clear-statement requirement and the requirements of § 3551(a), § 924(c) does not go as far as the Government asserts. Rather, the plain text of the statute establishes that § 924(c) requires only a mandatory sentence for each § 924(c) count, which may not run concurrently with any other sentence. The effect of § 924(c) is only to bar concurrent terms of imprisonment; it permits courts to impose *any* sentence on an underlying offense, and to consider all relevant factors in imposing that sentence. By contrast, in the aggravated identity theft statute, 18 U.S.C. § 1028A(b), Congress expressly directed sentencing courts *not* to take into account the mandatory minimum sentence in imposing a sentence on the underlying offense. That clear statement of intent to abrogate the common law practice is absent from § 924(c). A district court thus retains discretion to consider the consecutive § 924(c) sentence or sentences in

imposing a penalty for an underlying offense. Indeed, the court is obligated to do so pursuant to § 3553(a) if failing to consider the mandatory minimum would otherwise yield a sentence in the case as a whole that is greater than necessary. And, even assuming some ambiguity in the statutory language, the rule of lenity defeats the Government's interpretation.

ARGUMENT

I. JUDICIAL DISCRETION TO CONSIDER ALL INFORMATION ABOUT THE CASE AND THE OFFENDER IS A TIME-HONORED PRINCIPLE OF AMERICAN LAW

"For generations, legislatures have relied on individual judicial judgment to balance case-specific equities in order to impose a fair sentence." Reply Brief for the United States at 12, *Beckles* v. *United* States, No. 15-8544 (Nov. 2016). "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon* v. *United States*, 518 U.S. 81, 113 (1996); *accord Pepper* v. *United States*, 562 U.S. 476, 487–88 (2011). The commitment to respect and safeguard judicial discretion has become "one of the most powerful and pervasive doctrines in the law of sentencing." Arthur W. Campbell, *Law of Sentencing* § 9:3 (3d ed. West 2004).

The discretion vested in sentencing judges historically has manifested in three ways. *First*, judges historically have had discretion to sentence defendants to any term in prison and any amount in fines within limits established by Congress, most commonly in the form of statutory

maximums. *Second*, judges have had discretion to structure defendants' sentences as they see fit by determining whether a sentence would be served concurrently or consecutively with any other sentences imposed. *Third*, judges have had discretion to draw on whatever reliable information they deem relevant in determining the term and structure of defendants' sentences, subject only to certain constitutional constraints.

Although in recent years Congress has attempted to cabin the first two aspects of judicial sentencing discretion, it has not constrained the ability of judges to take account of all relevant information about a defendant. On the contrary, recognizing that this aspect of judicial discretion goes to the heart of the criminal law's ability to treat each defendant as an individual, Congress has expressly affirmed district judges' ability to consider the fullest information possible concerning the offenders before them.

A. Judicial Discretion Has Historically Been Understood as a Means of Ensuring Justice in Individual Cases

1. After the Revolutionary War, reform-minded legislators embraced greater judicial discretion as a means to temper the harshest aspects of sentencing under the common law. In 18th century England, death, not imprisonment, was the norm for punishing most felonies. *See* 4 William Blackstone, *Commentaries* *18–19 (discussing the "melancholy truth" that English law prescribed the death penalty for no fewer than 160 crimes). The list of crimes warranting capital punishment included felling trees in a park, setting a cornfield afire, sending threatening letters, destroying a turnpike gate, and shooting a rabbit. Campbell, § 1:2. For these offenses, the English (and colonial) judge's role was largely ministerial: Pronounce the sentence of death as mandated by the jury's

verdict. *See Apprendi* v. *New Jersey*, 530 U.S. 466, 479–80 (2000). By contrast, the common law of misdemeanors, though still harsh, afforded judges relatively more flexibility. For these offenses, "punishment was at the discretion of the justices [of the peace]." J. H. Baker, *An Introduction to English Legal History* 512 (4th ed. 2002). By the 18th century, judges usually chose among fines, whipping, and imprisonment. *Ibid.*

As early as the 1780s, American lawmakers began responding to criticism that their inherited criminal codes were too bloodthirsty and did not allow for the individualization of punishment. *See* Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 Val. U. L. Rev. 693, 696–98 (2005). Drawing inspiration from the work of philosophers and scholars such as Beccaria, Blackstone, and Bentham, reformers favored imprisonment within offense-specific limits set by legislators as a means of "securing a new and more rational and humane criminal jurisprudence." Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. Crim. L. & Criminology 35, 42 (1921). Thus, in 1789, the first criminal statute enacted by the First Congress provided that the defendant

> shall . . . be punished by fine or imprisonment, or both, in the discretion of the court . . . , so as the fine shall not exceed one thousand dollars, and the term of imprisonment shall not exceed twelve months.

An Act to Regulate the Collection of the Duties, ch. V, § 35, 1 Stat. 29, 46–47 (1789). The following year, the Crimes Act of 1790 continued along this reformist path. Of the 22 new federal offenses created, many of them felonies, only six required a determinate sentence of hanging. *See* An Act for the Punishment of Certain

Crimes Against the United States, ch. IX, 1 Stat. 112 (Crimes Act of 1790). These early laws provided a template that, for the most part, continues to shape modern statutes. *Compare* Crimes Act of 1790, § 18, 1 Stat. at 116 (providing that every person guilty of perjury "shall be imprisoned not exceeding three years, and fined not exceeding eight hundred dollars"), *with* 18 U.S.C. § 1621 (providing that every person guilty of perjury "shall . . . be fined under this title or imprisoned not more than five years, or both").

Early Congresses did, on occasion, establish statutory minimums as well as maximums. For example, a 1798 statute concerning fraud against the Bank of the United States required that the offender "be imprisoned and kept at hard labour for a period not less than three years, nor more than ten years." An Act to Punish Frauds Committed on the Bank of the United States, ch. LXI, 1 Stat. 573, 573–74 (1798); *see also* An Act for the Punishment of Certain Crimes Against the United States, ch. LXXIV, § 1, 1 Stat. 596, 596 (1798) (providing for imprisonment from six months to five years for conspiracy to commit sedition). But within these broad statutory ranges, the judge remained free to assign the sentence he believed was just. *See* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9–10 (1998).

2. Beyond the discretion to determine the term of a particular sentence, judges have traditionally been responsible for deciding whether sentences run concurrently or consecutively when a defendant is convicted of multiple offenses or is serving a prior sentence at the time of his conviction for a subsequent offense. *Setser* v. *United States*, 566 U.S. —, 132 S. Ct. 1463, 1468 (2012). In this respect, American law drew on established English precedent rather than departing from it. In 1769,

the House of Lords explained that a judge's exercise of discretion to assign a "cumulative" (*i.e.*, consecutive) punishment was nothing more than "shaping the judgment to the peculiar circumstances of the case." *R* v. *Wilkes*, 19 How. St. Tr. 1075, 1134 (H.L. 1770). In sentencing the defendant, who had been convicted of two offenses and sentenced to consecutive terms of 10 months and 12 months, respectively, the Lords explained that the judge was "providing . . . the punishment the Court thought his crime deserved." *Ibid.*; *see also* 1 Joseph Chitty, *A Practical Treatise on The Criminal Law* *718 (courts may provide for consecutive sentences "in their discretion").

The Virginia Supreme Court recognized this principle as early as 1806. *See Commonwealth* v. *Leath*, 3 Va. 151, 154–55 (1806) (holding that defendants "may be adjudged" to imprisonment whereby each term "commence[s] from and after the expiration" of the previous terms). The Connecticut Supreme Court reached the same result five years later, confirming what had been "the usage of our courts, for many years past, in this state." *Connecticut* v. *Smith*, 5 Day 175, 179 (1811). As the court explained, "if, for the advancement of justice, or through the exercise of mercy, the punishment may be delayed, a day, or a month, upon the same principle, it may be, for sufficient cause, postponed for one or more years [to accommodate a prior sentence for another conviction], according to the discretion of the court." *Ibid.* By the end of the 19th century, "there [was] no question of the power of the court to impose cumulative sentences for separate offenses, according to the very decided weight of authority at the common law." *Howard* v. *United States*, 75 F. 986, 991 (6th Cir. 1896) (citing *Wilkes*, *supra*). That discretion was ultimately codified in federal law at 18 U.S.C. § 3584. *See Setser*, 132 S. Ct. at 1469.

3. Finally, in order to effectuate the informed exercise of a judge's discretion to set the term and structure of a defendant's sentence, courts have long been afforded discretion to consider any information relevant to determining a just sentence. "'[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.'" *Pepper*, 562 U.S. at 488 (quoting *Williams* v. *New York*, 337 U.S. 241, 246 (1949)); *see, e.g.*, *State* v. *Smith*, 2 Bay 62, 62–63 (S.C. Const. App. 1796) ("[A]ll [] extenuating circumstances should be submitted to the court . . . ."); *People* v. *Vermilyea*, 7 Cow. 108, 109 (N.Y. Sup. Ct. 1827) ("[T]he circumstances in evidence must be laid before [judges] . . . to enable them to estimate the measure of punishment.").

Thus, for example, in the 1798 trial of Congressman Matthew Lyon, Justice Paterson, riding circuit in Vermont, sentenced Lyon only after taking account of both the Congressman's status as an elected official (an aggravating circumstance) and his recent financial troubles (a mitigating circumstance). As Justice Paterson explained to Lyon in imposing his sentence:

> Your position, so far from making the case one which might slip with a nominal fine through the hands of the court, would make impunity conspicuous should such a fine alone be imposed. What, however, has tended to mitigate the sentence which would otherwise have been imposed, is, what I am sorry to hear of, the reduced condition of your estate.

Case of Lyon, 15 F. Cas. 1183, 1185 (C.C.D. Vt. 1798). Lyon was sentenced to four months in prison and a $1,000 fine (well below the statutory maximums of two years and $2,000, respectively). *Ibid.*

Ultimately, a judge's discretionary consideration of "the fullest information possible concerning the defendant's life and characteristics" came to define the American approach to sentencing: namely, that "the punishment should fit the offender and not merely the crime." *Williams*, 337 U.S. at 247; *see also Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."); *Lockett* v. *Ohio*, 438 U.S. 586, 602 (1978) (plurality op.) ("[T]he concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country. Consistent with that concept, sentencing judges traditionally have taken a wide range of factors into account." (citations omitted)).

B. Congress Has Expressly Affirmed Judges' Discretion To Consider the Fullest Information Possible

The path of judicial discretion from the founding to the present has not been uncomplicated or uncontroversial. Most significantly, the Sentencing Reform Act of 1984 (SRA), 98 Stat. 1987, "made far-reaching changes in federal sentencing." *Koon*, 518 U.S. at 92. The SRA responded to certain perceived ills that its drafters believed resulted from unconstrained judicial discretion. *Mistretta* v. *United States*, 488 U.S. 361, 363–66 (1989); *see also* Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) <http://

tinyurl.com/KennedyABA>; Edward M. Kennedy, *Criminal Sentencing: A Game of Chance*, 60 Judicature 208 (1976); Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1972).

It is significant, however, which aspects of judicial discretion Congress limited—and which it did not. The Sentencing Guidelines (at least while they were mandatory) and congressional enactments increasing the number of mandatory minimum sentences narrowed the boundaries within which district courts can determine the term of imprisonment. *See, e.g.*, Families Against Mandatory Minimums, *Mandatory Minimum Sentences Created, Increased, or Expanded by Congress, 1987–2012* <http://tinyurl.com/MM1987-2012>. And Congress's dictate that certain crimes, such as § 924(c), carry mandatory minimum sentences that may not run concurrently with any other curtailed the judiciary's discretion to structure certain sentences in light of individual circumstances.

But Congress has not curtailed judicial discretion to consider the widest range of information in reaching a just sentence—whether in the SRA or otherwise. On the contrary, Congress has repeatedly "[a]cknowledg[ed] the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances." *Koon*, 518 U.S. at 92. In 1970, "Congress . . . affirmed this fundamental sentencing principle" by enacting 18 U.S.C. § 3577 (1970). *United States* v. *Grayson*, 438 U.S. 41, 50 (1978). That provision stated:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

The same language was incorporated that year into the Controlled Substances Act, subject only to any exceptions that might be authorized in the same subchapter. *See* 21 U.S.C. § 850.

Notwithstanding the fundamental changes the SRA worked to other aspects of judicial discretion, it left § 3557 untouched, recodifying it as § 3661. In addition, the Sentencing Commission expressly incorporated the new § 3661 in the Guidelines, where it remains today:

> In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, *without limitation*, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661.

U.S.S.G. § 1B1.4 (emphasis added); *see also* Fed. R. Evid. 1101(d)(3) (sentencing not governed by rules of evidence, other than privileges). "Both Congress and the Sentencing Commission thus expressly preserved the traditional discretion of sentencing courts to 'conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.'" *Pepper*, 562 U.S. at 489 (alteration in original) (quoting *United States* v. *Tucker*, 404 U.S. 443, 446 (1972)).[3]

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[3] "Of course, sentencing courts' discretion under § 3661 is subject to constitutional constraints." *Pepper*, 562 U.S. at 489 n.8. For example, as a matter of due process, information used at sentencing must be reliable. *See Townsend* v. *Burke*, 334 U.S. 736, 740–41 (1948).

As a result of both judicial tradition and congressional affirmance of that tradition, judges have always been entrusted with the power and duty to base their sentencing decisions on the fullest information possible concerning the cases and offenders before them. *See Koon*, 518 U.S. at 113. And despite shifts in sentencing practices, the preservation of a judge's discretion to consider the whole person, and all the attending circumstances, has reflected "a recognition of and respect for the individuals caught in the interstices of the general standards—the individual who could well be helped, or even changed if only we paid attention, the individual who surely does not deserve cookie-cutter justice." Nancy Gertner, Remarks at the American Bar Association Justice Kennedy Commission 11 (Nov. 12, 2003) <http://tinyurl.com/GertnerABA>. As Justice Kennedy has explained, "the prisoner is a person; still, he or she is part of the family of humankind." Kennedy, *supra*, at 2. A judge's discretion to consider all information relevant to a sentence protects the dignity of each individual defendant.

II. ABROGATING JUDICIAL DISCRETION IN THE SENTENCING CONTEXT REQUIRES A CLEAR STATEMENT OF CONGRESSIONAL INTENT

A. In light of the unique role judicial discretion has occupied in the federal sentencing tradition, this Court has repeatedly rejected attempts to curb a district court's discretion in the face of equivocal statutory language. As a result, if Congress intends to depart from longstanding practice by limiting a district court's discretion, it must say so in clear terms.

In *Dorszynski* v. *United States*, 418 U.S. 424 (1974), this Court held that, where a proffered interpretation will have the effect of "limiting the sentencing court's discretion," courts "will not assume Congress to have intended

such a departure from well-established doctrine without a clear expression to disavow it." *Id.* at 441. *Dorszynski* concerned a provision of the Federal Youth Corrections Act (since repealed by the SRA) providing that "[i]f the court shall find that the youth offender will not derive benefit" from the Act's provisions, "then the court may sentence the youth offender under any other applicable penalty provision." *Id.* at 436. The defendant urged an interpretation that would require the district court to provide a statement of reasons regarding the lack of any "benefit" before the court could sentence a youth offender outside the Act's provisions. This Court observed that the provision of a statement of reasons served "to facilitate appellate supervision of, and thus to limit, the trial court's sentencing discretion." *Id.* at 441–42. Because that limitation was "at odds with traditional sentencing doctrine," this Court rejected it in the absence of a clear statement to the contrary. *Id.* at 440.

Relatedly, the Court has stated that, because sentencing is "a matter of discretion traditionally committed to the Judiciary," a statute purporting to regulate a district court's discretion must be interpreted "in light of 'the common-law background against which the statute[] . . . [was] enacted.'" *Setser*, 132 S. Ct. at 1468 (ellipsis in original) (citation omitted). The issue in *Setser* was whether a district court had discretion to determine whether a federal sentence would run consecutively to a state sentence that had not yet been imposed. Section 3584 provides courts with the discretion to impose consecutive sentences when multiple sentences "are imposed . . . at the same time" and when the defendant "is already subject to an undischarged term of imprisonment." 18 U.S.C. § 3584(a). By its plain terms, the provision does not address a district court's authority with respect to a

future sentence. This Court rejected the defendant's contention that Congress's failure to provide for discretionary authority with respect to future sentences meant that discretion was absent. The common law recognized such authority, *see* 132 S. Ct. at 1468 (collecting cases), and there was no language in § 3584 or any other statute "to show that Congress foreclosed the exercise of district courts' sentencing discretion in these circumstances," *ibid.* Thus, the district court retained its common law authority to impose a consecutive sentence.

Finally, the Court has said that it will "decline[] to read any implicit directive into [] congressional silence" in the sentencing context. *Kimbrough* v. *United States*, 552 U.S. 85, 103 (2007). In *Kimbrough*, this Court confronted statutory provisions with minimum and maximum imprisonment terms for crack and powder cocaine and their interaction with the Guidelines. Although the relevant statute mentioned explicit weights only in relation to triggers for the statutory mandatory minimums, the Government argued that the statute "'implicitly'" addressed other amounts as well. *Id.* at 102 (brackets omitted). This reading encountered a "formidable obstacle" because it "lack[ed] grounding in the text" of the statute. *Ibid.* Favoring a "cautious reading," the Court refused to read in such meaning, stating that "[d]rawing meaning from silence is particularly inappropriate [in the sentencing context, because] Congress has shown that it knows how to direct sentencing practices in express terms." *Id.* at 103.

B. Congress itself codified a strong clear-statement principle in the SRA. Section 3551(a) provides:

> Except as otherwise *specifically provided*, a defendant who has been found guilty of an offense described

> in any Federal statute . . . shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

18 U.S.C. § 3551(a) (emphasis added). The most important directive of that chapter is the "overarching provision," *Kimbrough*, 552 U.S. at 101, articulated in § 3553(a) and commonly known as the "principle of parsimony," requiring the sentencing judge to impose, in each case, a sentence that is "sufficient, but not greater than necessary" to achieve the many purposes of punishment in the criminal justice system. 18 U.S.C. § 3553(a). In addition, § 3553(a) enumerates the familiar factors that a district court *must* consider in selecting that parsimonious sentence, including the history and characteristics of the defendant, § (a)(1), the need to protect the public from further crimes of the defendant, § (a)(2)(C), and "the kinds of sentences available," § (a)(3).[4] The Government has elsewhere conceded that consideration of a defendant's "other sentences" falls within the ambit of "§ 3553(a)'s broad categories of consideration." Brief for the United States 29, *United States* v. *Smith*, No. 13-1112 (10th Cir. Sept. 3, 2013); *see also Smith*, 756 F.3d at 1183–84, 1192 (noting concession); *United States* v. *Vidal-Reyes*, 562 F.3d 43, 49 n.4 (1st Cir. 2009) ("The effect of a mandatory consecutive sentence certainly bears upon the

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[4] Section 3553(a)(3) mandates attention in each case to the full range of sentencing options, including such issues as whether probation is available, the governing maximums, whether any minimum applies, whether restitution is mandatory, and whether there is any limitation on concurrency. *See* S. Rep. 98-225, 98th Cong., 1st Sess. 77 (1983).

§ 3553(a) factors to a certain extent."). Thus, unless "specifically provided" by another statute, a sentencing judge may appropriately consider the sentence imposed on another count of conviction as part of the mandatory factors enumerated in § 3553(a), and a judge must consider that sentence if failure to do so would result in a sentence that is "greater than necessary."

Congress's use of the word "specifically" in § 3551(a) is significant—and distinguishes it, even among provisions of the SRA. *See, e.g.*, 18 U.S.C. § 3583(b) (providing terms of supervised release "[e]xcept as otherwise provided"). At the time the SRA was enacted, dictionaries uniformly defined the word to mean "explicitly, particularly, definitely," *Black's Law Dictionary* 1254 (5th ed. 1979) and "free from ambiguity," *Webster's Ninth New Collegiate Dictionary* 1132 (1983). *See also American Heritage Dictionary* 1240 (1981) ("Explicitly set forth; particular; definite"); *Random House Dictionary of the English Language* 1366 (1981) ("explicit" and "definite"). It is "a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted); *accord Ratzlaf* v. *United States*, 510 U.S. 135, 140–41 (1994). Fidelity to that principle demands more than arguments resting on implication and inference if judges are to depart from the ordinary operation of § 3551. As Congress itself has instructed, any exception to § 3551 requires an unambiguous expression of legislative intent.

III. SECTION 924(c) DOES NOT ABROGATE A DISTRICT COURT'S DISCRETION TO CONSIDER THE LENGTH OF THE § 924(c) MANDATORY MINIMUM IN IMPOSING A SENTENCE ON THE UNDERLYING OFFENSE

Particularly when viewed in light of the requirement that Congress clearly evince its intent to abrogate a judge's discretion in the sentencing context, the plain text of § 924(c) does not support the Government's position.

A. Section 924(c) Does Not Clearly Evince Congressional Intent To Abrogate Judicial Discretion To Consider the Mandatory Minimum Sentence

In determining whether § 924(c) requires a district judge to blind herself to the fact of a defendant's § 924(c) mandatory minimum, this Court should begin "'with the language of the statute itself,' and that 'is also where the inquiry should end,' for 'the statute's language is plain.'" *Puerto Rico* v. *Franklin California Tax-Free Trust*, 579 U.S. —, 136 S. Ct. 1938, 1946 (2016) (quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)).

1. As relevant here, § 924(c) provides that any person who violates its substantive prohibition "shall, in addition to the punishment provided for [the underlying offense]" be sentenced to a mandatory minimum term of imprisonment. 18 U.S.C. § 924(c)(1)(A)(i). Next, it provides that, "[n]otwithstanding any other provision of law," no term of imprisonment imposed with respect to § 924(c) "shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed [for the predicate offense]." § 924(c)(1)(D)(ii).

Section 924(c) thus says two things—and *only* two things—about the district judge's discretion. *First*, the

judge must impose a minimum sentence on the § 924(c) count, regardless of whatever term she may think is appropriate—thus limiting the first aspect of judicial discretion discussed above. *Second*, that mandatory term must be "in addition to the punishment provided" for the underlying offense, which is to say, the mandatory term may not "run concurrently with . . . any term of imprisonment" for the underlying offense—thus limiting the second aspect of judicial discretion discussed here. But § 924(c) goes no further.

Section 924(c) does not say what term of imprisonment must be "provided" for the underlying offense. On the contrary, by using the term "any," the statute reflects Congress's understanding that there might not be any term of imprisonment at all for the underlying offense. This interpretation is reinforced by the fact that § 924(c) does not require that the sentence imposed run "consecutively," only that it *not be concurrent*, thus permitting, for example, a sentence of only a fine on the other count. *See* 18 U.S.C. §§ 3551(b), 3571(a). Nor does the statute say anything (beyond barring concurrent sentences) about how the district court should exercise its discretion with respect to imposing a sentence on the underlying offense, such as what information the district court should or should not consider or whether the term for the underlying sentence term may be concurrent to some third sentence. The absence of any mention of that sentence points toward the conclusion that some *other* source of law will "provide[]" the sentence for the underlying offense. *See Smith*, 756 F.3d at 1185.

But while § 924(c) is effectively silent as to the underlying offense, § 3551 is not. It provides that, in the absence of another provision that "*specifically* provide[s]" for a departure from its ordinary operation, the provisions

of Chapter 227 of Title 18 govern. *See United States* v. *Franklin*, 499 F.3d 578, 588 n.1 (6th Cir. 2007) (Moore, J., concurring). Those provisions, most notably § 3553(a)(3), *require* the sentencing judge to consider the effect of the mandatory sentence in imposing a sentence on the underlying offense if failing to do so would yield a punishment that is "greater than necessary" to achieve the purposes set forth in 18 U.S.C. § 3553(a)(2).

This interpretation in no way dilutes the punitive impact of § 924(c). On the contrary, the provision retains considerable force by "guarantee[ing] that—whatever the defendant's sentence for his underlying offense—he will *at least* and *always* serve a certain number of years for his gun crime." *Smith*, 756 F.3d at 1185. That is, § 924(c) limits the district court's discretion in two significant ways: Like all mandatory minimums, it ensures the defendant is sentenced to at least a legislatively specified term of imprisonment regardless of whatever the judge may think appropriate. In this case, for example, the district judge believed that a 30-year sentence was "more than sufficient," J.A. 26, but § 924(c) obligated him to impose that sentence on petitioner anyway. Section 924(c) also overrides the court's discretion to structure the sentence as it sees fit by denying the possibility of the mandatory term running concurrently with any other term.

2. The Government contends that "[n]othing in Section 924(c) . . . supports" petitioner's construction. Br. in Opp. 12. That view of sentencing law is exactly backwards. The question is not whether § 924(c) affirmatively reiterates a district court's existing discretion to take account of the fullest information possible about the defendant, including the existence of a mandatory consecutive term that renders further incarceration

unnecessary. The relevant questions instead are whether § 924(c) represents "a clear expression to disavow," *Dorszynski*, 418 U.S. at 441, "a matter of discretion traditionally committed to the Judiciary," *Setser*, 132 S. Ct. at 1468, as codified in § 3661, and whether § 924(c) is so explicit, definite, and unambiguous that it can fairly be characterized as "specifically providing" for a departure from the ordinary operation of § 3551 for sentencing as to the underlying offense.

Instead of pointing to unequivocal language in support of *its* favored construction, the Government asks this Court to "read an[] implicit directive" into § 924(c), *Kimbrough*, 552 U.S. at 103, that is simply not there. This Court has rejected such arguments before. *See, e.g.*, *Pepper*, 562 U.S. at 491 ("We have recognized that 'the broad language of § 3661' does not provide 'any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.'" (quoting *United States* v. *Watts*, 519 U.S. 148, 152 (1997) (per curiam))); *Kimbrough*, 552 U.S. at 103 ("Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms."). It should do so here again.

Indeed, one need not search far to find "*exactly* the language the [G]overnment wants to read into § 924(c)." *Smith*, 756 F.3d at 1186. Just as § 924(c) criminalizes the use of firearms "during and in relation to" certain crimes of violence, 18 U.S.C. § 1028A criminalizes identity theft "during and in relation to" certain enumerated felonies. And like § 924(c)(1)(A), § 1028A(a) provides that its sentence is "in addition to the punishment provided for" the underlying offense. Furthermore, § 1028A(b)(2) matches § 924(c)(1)(D)(ii) in prohibiting the imposition of a sentence that is concurrent to any sentence on the underlying

offense.[5] But then § 1028A sets off on a distinct path by providing that

> in determining any term of imprisonment to be imposed for the [underlying offense], a court *shall not in any way* reduce the term to be imposed for [the underlying offense] so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section[.]

§ 1028A(b)(3) (emphasis added). This language—entirely missing from § 924(c)—curtails the scope of information available to the sentencing judge in deciding the term of imprisonment on the underlying offense. It is the kind of "clear expression," *Dorszynski*, 418 U.S. at 441, that "Congress [knows] how to [provide] . . . in express terms," *Kimbrough*, 552 U.S. at 103. And it is the kind of language that § 924(c) would require if the Government's interpretation were to be sustained.

B. Any Ambiguity in § 924(c) Must be Resolved in Favor of the Defendant

If recourse to traditional tools of statutory construction leaves any doubt about the effect of § 924(c), this Court should invoke the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates* v. *United States*, 574 U.S. —, 135 S. Ct. 1074, 1088 (2015) (plurality op.) (internal quotation marks omitted). In the sentencing context, that requires

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[5] On the other hand, § 1028A does not emulate one significant feature of § 924(c): Section 1028A does not require that multiple mandatory minimum sentences for aggravated identify theft run consecutively to one another. *See* 18 U.S.C. § 1028A(b)(4) (preserving judicial discretion with respect to concurrency).

"choos[ing] the construction yielding the shorter sentence," *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (plurality op.), in light of the "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should," Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," in *Benchmarks* 196, 209 (1967).

1. The history of the rule of lenity supports its application in this context because the rule has its origins in the narrow construction of statutes providing for mandatory sentences. Faced with statutes that provided for mandatory death penalties for minor offenses, English courts began invoking a principle that "penal statutes must be construed strictly." 1 William Blackstone, *Commentaries* *88. Blackstone provides the example of a statute that took away the "benefit of the clergy"[6] if a defendant had been convicted of stealing "*horses*," but "the judges conceived that this did not extend to [to a defendant] that should steal but *one horse*." *Ibid.*; *see also R* v. *Cook*, 1 Leach 105 (K.B. 1774) (theft of a "heifer," though "clearly proved," could not be punished under a statute forbidding theft of a "cow"). Although traditionally framed as a rule governing the interpretation of substantive criminal prohibitions, the rule of lenity's roots lie in judicial attempts to delineate carefully the scope of offenses subject to harsh mandatory penalties.

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[6] "Benefit of the clergy" was a jurisdictional mechanism by which ordained clergy could transfer criminal cases brought against them out of the royal courts and into the ecclesiastical courts. Eventually, the "benefit" would be expanded to almost any male defendant who could read. *See generally* 4 Blackstone *365–74; John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 37–41 (1983).

Once brought to America's shores, the rule of lenity was unmoored from its origins in the sentencing context. Instead, it was justified primarily on concerns regarding the principle of legality, which holds that punishment must be imposed only pursuant to law, and on separation-of-powers principles. Thus, Chief Justice Marshall explained that the rule of lenity "is founded [both] on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820). A century later, Justice Holmes echoed the same point in explaining that the rule serves to ensure that courts do not punish "because it may seem to [them] that a similar policy applies" to acts not expressly covered by a statute, "or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). As Justice Scalia explained more recently, the judiciary has attempted to vindicate these fundamental principles through a practical rule that "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality op.).

Modern cases have thus categorized the rule of lenity as akin to a clear statement rule. For example, the Court has said that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [the judiciary] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952). Similarly, in *Bell* v. *United States*, 349 U.S. 81 (1955), the Court explained that the rule of lenity applies

when "Congress leaves to the Judiciary the task of imputing to Congress an undeclared will." *Id.* at 83–84. If, after consulting the traditional tools of statutory construction, "a reasonable doubt persists about a statute's intended scope," then the rule must be applied to resolve that doubt in favor of the defendant. *R.L.C.*, 503 U.S. at 305–06 (plurality op.) (internal quotation marks omitted).[7]

2. The rule of lenity confirms that the Government's interpretation of § 924(c) should be rejected. At best, the Government's argument rests on vague assertions of statutory purpose—"a sort of rule-of-severity interpretive canon." *Smith*, 756 F.3d. at 1191; *see* Br. in Opp. 12. "The best evidence of [legislative] purpose," however, "is the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). Even in cases

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[7] Some of this Court's cases embrace a different articulation of the rule of lenity. For example, *Muscarello* v. *United States*, 524 U.S. 125 (1998), includes language suggesting that only a "'grievous ambiguity or uncertainty'" will trigger the rule of lenity. *Id.* at 138–39 (quoting *Staples* v. *United States*, 511 U.S. 600, 619, n.17 (1994), and *Chapman* v. *United States*, 500 U.S. 453, 463 (1991)) ; *see also Shaw v. United States*, 580 U.S. —, — (Dec. 12, 2016) (slip op. at 8); *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974). These cases should not be read to depart from the traditional standard, as they lack any discussion evidencing an intent to modify the centuries-old rule repeatedly recognized by this Court. That line of cases also contains additional language that is more consistent with the clear-statement requirement of the rule as properly understood. *See, e.g.*, *Muscarello*, 524 U.S. at 139 (reasoning that the conduct at issue fell within the "'generally accepted contemporary meaning'" of the statutory language); *Chapman*, 500 U.S. at 463–64 (quoting formulation that lenity applies in cases of "reasonable doubt"). The application of the rule in the recent *Yates* decision reiterated the long-recognized "clear and definite" standard. *See* 135 S. Ct. at 1088 (quoting *Universal C.I.T. Credit Corp.*, 344 U.S. at 222).

where the statutory text is ambiguous, the rule of lenity requires construing the statute against the Government, notwithstanding the purported purpose of the statute. Indeed, this Court has already rejected essentially the same purpose-based argument as applied to this very statute. *See Busic* v. *United States*, 446 U.S. 398, 408–09 (1980) (refusing to interpret § 924(c) based on the "assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible," and applying the rule of lenity). The Court should do so again.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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